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5/18/00

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NUCLEAR REGULATORY COMMISSION  
10 CFR Parts 170 and 171  
RIN: 3150-AG50

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Revision of Fee Schedules; 100% Fee Recovery, FY 2000

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending the licensing, inspection, and annual fees charged to its applicants and licensees. The ~~proposed~~ amendments are necessary to implement the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, which mandates that the NRC recover approximately 100 percent of its budget authority in Fiscal Year (FY) 2000, less amounts appropriated from the Nuclear Waste Fund (NWF) and the General Fund. The amount to be recovered for FY 2000 is approximately \$447.0 million.

EFFECTIVE DATE: (Insert 60 days after publication in the Federal Register). Copies of comments received and the agency work papers that support these final changes to 10 CFR Parts 170 and 171 may be examined at the NRC Public Document Room. Comments received may also be viewed via the NRC's interactive rulemaking website <http://ruleforum.llnl.gov>. This site provides the ability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, 301-415-5905; e-mail [CAG@nrc.gov](mailto:CAG@nrc.gov).

With the exception of restricted information, documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/NRC/ADAMS/index.html>. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 202-634-3273 or by email to [pdr@nrc.gov](mailto:pdr@nrc.gov).

FOR FURTHER INFORMATION CONTACT: Glenda Jackson, Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Telephone 301-415-6057.

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**SUPPLEMENTARY INFORMATION:**

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**I. Background**

OBRA-90, as amended, requires that the NRC recover approximately 100 percent of its budget authority, less the amount appropriated from the Department of Energy (DOE) administered Nuclear Waste Fund (NWF). Certain NRC costs related to reviews and other assistance provided to the Department of Energy (DOE) and other Federal agencies were excluded from the fee recovery requirement for FY 2000 by the FY 2000 Energy and Water Development Appropriations Act.

The NRC assesses two types of fees to recover its budget authority. First, license and inspection fees, established at 10 CFR Part 170 under the authority of the Independent Offices Appropriation Act of 1952 (IOAA), 31 U.S.C. 9701, recover the NRC's costs of providing special benefits to identifiable applicants and licensees. Examples of the services provided by the NRC for which these fees are assessed are the review of applications for the issuance of new licenses, approvals or renewals, and amendments to licenses or approvals. Second, annual fees, established in 10 CFR Part 171 under the authority of OBRA-90, recover generic and other regulatory costs not recovered through 10 CFR Part 170 fees.

This final rule is based on the current 100 percent fee recovery requirement under OBRA-90. To address fairness and equity concerns related to NRC licensees paying for agency expenses which do not provide a direct benefit to them, the NRC has submitted legislation to the Congress which would reduce the fee recovery amount to 98 percent for FY 2001, and further reduce the fee recovery amount by an additional two percent per year beginning in FY 2002 until the fee recovery requirement is reduced to 90 percent by FY 2005.

Also, in the FY 1999 final fee rule published June 10, 1999 (64 FR 31450), the NRC responded to a comment requesting that NRC designate as small entities, for reduced fee purposes, all those companies with small business certification under the U.S. Small Business Administration's (SBA) Small Disadvantaged Business Program, commonly known as the 8(a) Program. The Commission agreed to give further consideration to the issue raised by this commenter.

The Commission has declined to adopt the suggested approach, for the following reasons. On April 11, 1995 (60 FR 18344), the NRC promulgated a final rule, after notice and comment rulemaking, that revised its size standards. The final rule established the small entity classification applicable to small businesses as follows. Those companies providing services having no more than \$5 million in average annual gross receipts over its last three completed fiscal years, or, for manufacturing concerns, having an average of 500 or fewer employees during the preceding 12-month period would qualify as small entities (10 CFR 2.810).

The NRC promulgated this rule pursuant to Section 3(a)(2) of the Small Business Act, which permits Federal agencies to establish size standards via notice and comment rulemaking, subject to the approval of the SBA Administrator. Unlike the NRC, the SBA's Standard Industrial Classification (SIC) System establishes size standards based on types of economic activity or industry. The NRC rule, which the SBA approved, established generic size standards for small businesses because NRC's regulatory scheme is not well suited to setting standards for each component of the regulated nuclear industry.

## II. Response to Comments

A total of 13 comments were received on the proposed rule. Many of the comments were similar in nature. These comments have been grouped, as appropriate, and addressed as single issues in this final rule.

The comments are as follows:

### A. Legal Issues.

#### 1. NRC's Interpretations of OBRA-90 and IOAA.

Comment. Several commenters have again raised questions about the NRC's legal interpretations of OBRA-90 and the IOAA. For example, it is argued by some commenters that OBRA-90 prohibits exemptions from Part 170 fees, and that accordingly the NRC must charge federal agencies, state agencies, and state licensees fees under Part 170 for specific services rendered. The same commenters claim that the current fee structure denies reactor licensees due process and equal protection under the U.S. Constitution.

Response. These arguments are not new, all having been fully raised by the same commenters last year, when the fee schedules were revised for FY 1999. In the FY 1999 final fee rule, the Commission carefully set forth both these comments and the agency's responses to them. The agency's response explained how the current fee structure fully complies with all statutory and constitutional requirements. Because last year's discussion was sufficiently detailed, and because there have been no new legal developments over that past year that would call for a different interpretation of the issues, interested parties are referred to the FY 1999 final fee rule responses to comments (64 FR 31448-50, June 10, 1999). However, there is one update to the discussion outlining actions NRC had taken over the past six years to reduce any residual inequity and unfairness in the current fee structure (64 FR 31450). Among those actions has been consistent support for legislation that would address the remaining fairness and equity issues by decreasing the amount of NRC's budget to be received through fees. The Senate has

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*The NRC's budget request included a request for legislative funding to reduce the fee amount.*

passed legislation that would reduce the fee recovery amount by 2 percent per year, beginning in FY 2001, until the fee recovery amount was reduced to 88 percent in FY 2005 (\$ 1627).

2. Information Provided by NRC in Support of Proposed Rule.

Comment. One commenter complained that in deriving the FY 2000 <sup>annual</sup> fee by simply escalating last year's ~~annual~~ fee by 1.4 percent, the NRC has not given "any consideration" to whether underlying costs have any rational connection to reactor regulation or any consideration whether the total assessment is as fair and equitable as is feasible. The commenter also claims that the proposed rule fails to provide "any explanation and accounting of the expenses that are covered by this charge," and thus "denies the companies a meaningful opportunity to comment."

Another commenter indicated that, under the provisions of the Administrative Procedures Act, the NRC should provide detailed cost information associated with each component of reactor regulation and other generic costs. The commenter believes this would provide for more effective feedback and comment, and would promote increased Commission efficiency because the costs of services and other agency expenses, such as overhead, would be more visible to stakeholders. The commenter also requested that NRC provide a more detailed account of major research contracts, their purpose, and costs.

Response. The NRC believes there is nothing obscure about the 1.4% increase in annual fees, or its relation to reactor regulation. The FY 2000 notice of proposed rulemaking clearly describes the calculation that leads to the 1.4% increase (65 FR 16251, 16253-4), and the calculation is also repeated in this Federal Register notice on the final rule. In addition, the proposed rule announced the availability of the agency's workpapers that support these calculations. Furthermore, the NRC has made available in the Public Document Room NUREG-1100, Volume-15, "Budget Estimates and Performance Plan, Fiscal Year 2000 (February 1999)." This document discusses in detail the NRC's budget for FY 2000, including the activities to be performed in each strategic arena. Reactor-related research activities are described under the Nuclear Reactor Safety arena.

The fact that the agency decided to derive the FY 2000 annual fees by means of a percentage increase in no way indicates that the fee was derived without regard to the costs of reactor regulation. To the contrary, the very decision to proceed by percentage increase is based on a consideration of, among other things, whether there has been a substantial change in the magnitude of the budget allocated to a specific class of licensees. The percentage change method exists not so the agency can avoid the effort of making the best possible match between fees and services, but rather to give licensees some cost stability. Last year the NRC solicited comment on whether it should retain the percent change method or rebaseline annual fees every year (63 FR 15884; April 1, 1999). The majority of commenters favored continued use of the percent change method, because they desire some stability in fees. The Commission has therefore retained this method, with the additional caution that fees will be rebaselined at least every three years.

It should be noted that the 1.4 percent increase in annual fees is not the result of a budget increase. The NRC believes this year's 1.4% increase in fees is a nominal figure.

The so-called "increase" in annual fees is yet another decrease in real resources, because supporting this certification is that over the course of FY 1999 inflation, as measured by the usual Consumer Price Index, ran 2.4%, a full percentage point higher than the percent increase in annual fees in nominal dollars. This represents an actual decrease in fees of approximately 1%. The NRC's budget, in real terms, is down once again -- to an all-time low, a 25% decrease in the last 7 years alone, with staffing levels their lowest in 20 years -- all achieved while the agency has expended large resources in extraordinary reform efforts, particularly in enforcement and power reactor oversight, efforts long sought by the power reactor industry.

**B. Specific Part 170 Issues.**

**1. Project Manager Billings Issues.**

**Comment.** Parties commenting from the uranium recovery industry were strongly opposed to the NRC's current billing method for Project Managers (PMs). Many comments were directed towards the unfairness of the types of PM activities being charged to licensees that had little or no apparent connection to the sites the PMs were managing. ~~one~~ <sup>one</sup> commentor stated that non-direct PM charges should be captured under Part 171 annual fees vs Part 170 ~~direct charge~~ fees due to the inequities of the NRC's current billing system, thereby allowing non-direct PM charges to be evenly distributed to all uranium recovery licensees paying annual fees.. Another concern voiced was the unequal distribution of licensee sites among PMs, thereby subjecting certain licensee's to a disproportionate share of PM non-direct (e.g., administrative).

**Response.** In an effort to shift cost recovery from Part 171 annual fees to Part 170 fees, the NRC made a conscientious decision in FY 1999 to recover through Part 170 fees the full costs for PMs, with the exception of PM activities that are generic in nature (e.g., rulemaking and preparation of generic guidance documents, etc.) and leave time. This decision is consistent with Title V of the IOAA, interpretations of that legislation by the Federal courts, and previous Commission guidance. In summary, these guidelines provide that Part 170 fees may be assessed to persons who are identifiable recipients of "special benefits" conferred by specifically identified activities of the NRC. These special benefits include services rendered at the request of a recipient and all services necessary to the issuance of a required permit, license, certificate, approval, amendment, or other services necessary to assist a recipient in complying with statutory obligations under the Commission's regulations.

With the exception of generic activities and leave time, <sup>The assignment of a PM</sup> PM activities are services which the NRC provides to specific, identifiable beneficiaries, i.e, the site or sites to which the PM is assigned. Thus, as the NRC stated in the FY 1999 final rule, it is more appropriate that the costs of these activities be recovered through Part 170 fees assessed to the recipient of the service ~~than through annual~~ fees assessed to all of the licensees in a particular class (FR ). It should be noted that this change results in licensees who have ceased operations being charged for the full of costs for PMs assigned to their sites. If these costs were included in the Part 171 annual fee, only operating licensees or licensees in standby would pay the costs.

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As indicated in the final FY 1999 fee rule, the NRC readily acknowledges that certain PM activities are not directly related to a specific licensing action or inspection, or even to a specific site. However, these activities are part of the costs to the agency of providing the PM services, and these costs should be recovered from the licensee benefitting from those services. Examples of these activities were provided in the FY 1999 final rule; however the list of examples was not intended to be all-inclusive. Day-to-day PM activities to be recovered through Part 170 fees include the general management and oversight of the particular site or sites to which they are assigned, and general activities such as training, general travel, general correspondence, staff meetings, coordination with other offices, and processing documents into the NRC's Agencywide Document Access and Management System (ADAMS). A review of the PM time reported in the first two quarters of FY 2000 indicates that approximately 10-15 percent of a PM's time is spent on general or non-site specific administrative duties. The NRC believes it is appropriate to recover the costs for this small percentage of the PM time from the assigned site or sites.

***However, in the initial implementation of the new PM billing provision, certain PM activities were incorrectly coded for fee billing purposes. Corrections are being made to those Part 170 invoices that erroneously included PM time for activities not directly related to the mission of the agency, including Union activities ~~Combined Federal Campaign~~ activities, and activities that should have been recorded as leave time, such as blood donations. However, activities that are part of the agency mission, such as Equal Employment Opportunity activities, will continue to be included in the PM time for Part 170 billing purposes.***

***The NRC understands some commenters' concerns about the unequal distribution of licensee sites among PMs in the NRC's Uranium Recovery Program. In the case of PMs assigned to more than one license or site, the PM time that is not directly related to a specific site or to generic activities is prorated to each of the assigned licenses or sites. The NRC contends that a site that requires a full time PM should bear more of the PM's general and administrative costs and therefore the unequal distribution of these costs between the licensees in the class is not inappropriate. As noted above, this time is a small fraction of the total PM time.***

## **2. Hourly Rates.**

**Comment.** Several uranium recovery commenters stated the hourly rate of \$143 for PMs/professional staff was excessive considering that senior-level private consultants in the industry charge far less for comparable services. A reactor licensee called the \$3 per hour increase unacceptable, and suggested that NRC help the regulated community by controlling and reducing annual fees, not increasing them to "pay higher wages." Another commenter

requested that prior to finalizing the FY 2000 fee rule, the NRC address the NRC's Office of the Inspector General (OIG) recommendation to evaluate the hourly rate methodology. This commenter believes no substantive justification has been given for formulating hourly rates by using budget data rather than actual data from previous year's billings.

Response. The NRC is revising the professional hourly rates to \$143 for the nuclear materials and nuclear waste program and \$144 for the reactor program. As required by OBRA-90, the NRC must recover approximately 100 percent of its budget authority, less the appropriation from the Nuclear Waste Fund, through either fees for direct services (Part 170) or annual fees (Part 171). The professional hourly rates, ~~which are based on budgeted costs,~~ must be established at these levels to meet the fee recovery requirement.

The revised professional hourly rates of ~~\$143 and \$144~~ <sup>represent</sup> mark a \$3 per hour increase over FY 1999, which is primarily attributable to the Government-wide pay increase which went into effect January 2000. This equates to approximately a 2.1 percent increase over the previous year for professional hourly rates, while at the same time inflation, as measured by the Consumer Price Index, was approximately 2.4 percent.

The NRC's hourly rates are established to recover the cost of maintaining a professional employee, such as salaries and benefits and overhead, and to recover general and administrative costs, such as heat, lighting, and supplies. These budgeted costs are incurred whether a professional employee is performing work that is billable under Part 170 or work that is recovered through annual fees. The time spent by a professional employee in performing work that is subject to Part 170 fees is traced to the billable activities and charged at the professional hourly rate to the recipient of the service. Any direct contract support costs incurred in providing the service are also traced and billed directly to the recipient. Because the hourly rate is not intended to be used only for work that is billable under Part 170, the NRC believes it is more appropriate to use budget data than to base the hourly rate calculations on historical Part 170 type billing data.

With regard to the OIG's findings and recommendations, the Commission continues to assert its fee schedules are in full compliance with the requirements of the ~~Independent Offices Appropriation Act (IOAA) and OMB circular A-25.~~ Further, the NRC's methodology for calculating the IOAA fees was upheld by the Court in Mississippi Power & Light v. NRC [601 F. 2d 223 (5th Cir. 1979)]. An internal NRC review of the contract costs excluded from the hourly rate concluded that there is no basis to include these costs in the hourly rates as suggested by the OIG. ~~In addition,~~ the NRC contracted with a professional accounting firm to review the current methodology for calculating the hourly rates and recommend alternative methods. The accounting firm's report is currently being evaluated by the NRC.

3. Invoice Information.

Comment. Several commenters expressed concern over the lack of appropriate invoice detail regarding quarterly billings for NRC staff services provided to licensees.

Response. The NRC believes that sufficient information is currently provided to licensees or applicants on which to base payment of invoices. The NRC has addressed this

issue previously in a similar response to the American Mining Congress (60 FR 20918, April 28, 1995). The NRC's invoices for full-cost licensing actions and inspections currently contain information detailing the type of service for which the costs are being billed, the date or date range the service was performed, the number of professional staff-hours expended in providing the service, the hourly rate, and the contractual costs incurred.

A licensee or applicant who does not understand the charges, or who feels they need more information to interpret a bill may request additional information from the NRC regarding the specific bill in question. The NRC will provide all available data used to support the bill upon a request of the licensee or applicant. Additionally, if requested, the NRC program staff will provide a best estimate of the hours required to complete a specific licensing action, with the caveat that the actual hours expended may differ from that estimate based on certain circumstances (e.g., timeliness of submittals, quality of products being submitted for review, etc.). However, OMB Circular A-25 which establishes guidelines for Federal agencies to assess fees for Government services, provides that new cost accounting systems need not be created solely for the purpose of determining or estimating full cost. Therefore, the NRC does not currently plan to develop additional systems beyond those already described solely to provide additional cost information.

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C. Specific Part 171 Issues.

1. Percentage change methodology.

Comment. One commenter stated that although they agree that fee stability is "a reasonable goal," and rebaselining might require more resources, the "industry" believes annual fees should be rebaselined each year. The commenter believes annual rebaselining would serve to promote agency efficiency by focusing on the value of the programs and other changes that have an impact on resource requirements. The commenter referenced a recent audit by the OIG which concluded that extended use of the percentage change method may result in a deviation from associating fees with the costs of services provided.

Response. The Commission, after evaluating all pertinent factors, has determined that the use of the percentage change method for determining FY 2000 annual fees does not result in a loss of the required "reasonable relationship" between fees and the costs of providing services. In the FY 1999 proposed fee rule (---FR---), the Commission specifically solicited public comment on the frequency for rebaselining. The majority of the comments received on this issue supported continuing the use of the percent change method, and rebaselining every several years as warranted. These commenters were concerned about fee stability and predictability, and therefore were not in favor of annual rebaselining. Prior to FY 1999, Commission policy required that annual fees be rebaselined every five years, or earlier if there was a substantial change in the total NRC budget or in the magnitude of the budget allocated to a class of licensees. In FY 1999, based on experience gained as a result of applying the criteria for rebaselining over the previous four years, the Commission implemented a revised policy requiring that future annual fees be rebaselined every three years, or earlier if warranted. The Commission's decision on the appropriate method for establishing annual fees (i.e., rebaselining vs percentage change) is made each year after considering the criteria for rebaselining and all relevant facts.

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## 2. Small Entity Fee Increase

**Comment.** Several comments were received on the proposed 25 percent increase in the small entity annual fees. Some commenters indicated that a 25 percent increase would have negative economic impacts on their businesses. These commenters said it would be difficult for them to recover the increase, and it could force some small companies to give up their licenses. One commenter stated that the NRC's reason for the increase was the decrease in the number of licensees. This commenter said that businesses faced with reduced sales would not be able to increase prices, but rather would be forced to reduce their budgets, and ~~that~~ this would be an obvious solution for the NRC to follow. Two commenters noted that while the annual fee assessed to small entities would increase by 25 percent, the annual fee for certain other licensees, such as gauge users, would not increase.

Several commenters suggested alternatives to the current basis for the small entity annual fee. One commenter suggested that, instead of gross receipts, the fee be based on net receipts or receipts from regulated activities. Another recommended that the small entity fee be based on the number of gauges owned or leased. This commenter indicated that there are increased licensing and inspection costs associated with larger numbers of gauges, and there would be no additional expense for licensees to provide this information because they already maintain a gauge inventory. A third commenter requested that small entity size standards be established for reactor licensees based on the utility's total capacity, number of employees, customers in the rate base, or a combination of these factors.

Some commenters requested that the NRC establish more tiers or levels of fees, indicating that the spread between the current tiers is too great. One commenter said one company should not be burdened with the same fee as a company with fourteen times the gross receipts. Another commenter said the current lower tier of \$350,000 in annual gross receipts should be increased to \$1 million to reflect FY 2000 equivalent dollars.

**Response.** The NRC is increasing the small entity annual fee and the lower tier small entity fee by 25 percent in this final rule. While NRC recognizes the effect this increase may have on some small entities, the NRC believes this action strikes a balance between the requirement of OBRA-90 to collect approximately 100 percent of the NRC's budget authority through fees, and the Regulatory Flexibility Act (RFA) requirement to consider the impact of agency actions on small entities.

The NRC has determined that assessing costs to the materials class of licensees which are attributable to that class, as indicated in the Conference report accompanying OBRA-90, results in a significant impact on a substantial number of small entities. However, the NRC is not required to reduce or eliminate the impact on small businesses, but must evaluate the impact and explain its decisions. The Regulatory Flexibility Analysis is attached to this final rule. Given the conflicting goals of OBRA-90 and the RFA, the Commission determined that the impact on small entities should be reduced by establishing a maximum annual fee for licensees who qualify as small entities.

The 25 percent increase in the small entity annual fee is not due to a decrease in the number of licensees as one commenter believes. A decrease in the number of licensees is

a contributing factor in the overall 1.4 percent increase in FY 2000 annual fees. However, the 25 percent increase in the small entity annual fee results from changes that have occurred in the types of costs recovered through annual fees and increases to costs since the \$1,800 small entity fee was established. When the \$1,800 maximum small entity annual fee was established in FY 1991, small entities also paid fees for inspections, amendments, and license renewals, resulting in an average of \$3,400 in fees paid by small entities per year. Over time, however, the inspection, amendment, and renewal fees have been eliminated from Part 170 charges and have been incorporated in the annual fees assessed to the materials class of licensees. As a result of these and other changes, the average total fees paid per year by other materials licensees increased by approximately 25 percent, from \$6,700 in FY 1991 to \$8,400 in FY 1999. For the same period, the average total fees paid per year by small entities decreased approximately 47 percent, from \$3,400 in FY 1991 to \$1,800 in FY 1999.

Part 171

~~but the lower-tier small entity fee of \$1,800 is still less than the average total fees paid by other materials licensees of \$8,400.~~  
In order to recover approximately 100 percent of the budget as required by law, other licensees must pay for costs not recovered from small entities. With the 25 percent increase to the small entity annual fees, the FY 2000 small entity subsidy to be recovered from other licensees is approximately \$5.6 million; without the increase the subsidy would be approximately \$6.0 million. The increase will mean that small entities will pay more of the costs attributable to them, but still benefit from reduced annual fees. For most fees categories, the \$2,300 annual fee per license category for small entities is approximately 26 percent less than the \$3,400 in average total fees paid by small entities in FY 1991.

the revised small entity fee of \$2,300 is still less than the average total fees paid by other materials licensees of \$8,400.  
25 percent

The NRC's size standards, which are codified in 10 CFR 2.810, are outside the scope of this rulemaking and therefore commenters' suggestions that the size standards be revised are not being addressed in this final rule. The NRC's receipts-based size standard for small businesses not engaged in manufacturing is promulgated on the Small Business Administration (SBA) size standard of \$5.0 million in annual gross receipts for these businesses. The SBA defines gross receipts as those which include "revenues from sales of products or services, interest, rent, fees, commissions and/or whatever sources derived."

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The NRC has previously considered comments that the fees for small businesses be based on such factors as the number of gauges used, the volume of patients administered to, or receipts from the use of regulated activities (FR, FR, FR). The NRC rejected these alternatives because they would not necessarily meet the goal of the RFA to minimize the impact of agency actions on small entities. For example, if the NRC based the reduced annual fee on the number of gauges owned, a large firm with only one gauge would get a reduced fee, while a small business with more than one gauge would pay a larger fee. Similarly, a large medical establishment would pay a reduced fee if only a small part of its business involved nuclear procedures, whereas a small medical facility whose entire business involved nuclear procedures would pay a larger fee. Basing the fees on the small entity size standards ensures that benefits of the reduced fees apply only to small entities.

In FY 1999, approximately 43 percent of the licensees qualifying as small entities for purposes of reduced annual fees qualified for the lower-tier small entity fee. Therefore, because the current lower tier fee significantly reduces the impact of the annual fee for

licensees with relatively low gross annual receipts or supporting populations, the NRC does not believe any additional tiers are appropriate.

### 3. Effects of Shifting Cost Recovery from Part 171 to Part 170

Comment. Some commenters indicated that the NRC's attempt to shift <sup>cost recovery</sup> fees from Part 171 ~~category~~ to Part 170 ~~category~~ is illusory at best, and represents no real savings to the licensee. They further expounded that shifting these costs to Part 170 fees has not resulted in an offsetting decrease in Part 171 fees, thereby exacerbating an already unfair and inequitable situation.

Response. The NRC takes issue with the commenters' specific concern about increasing 170 fees with no corresponding drop in Part 171 fees. As required by OBRA-90, the Part 171 annual fee recovery amounts are offset by the estimated Part 170 fee collections. The estimated collections for FY 2000 include a \$2.4 million increase in estimated Part 170 fees, from \$103.5 million in FY 1999 to \$105.9 million for FY 2000. This increase is largely attributable to changes in Commission policy included in the FY 1999 final fee rule, such as billing full cost under Part 170 for PMs, performance assessments, incident investigations, and reviews of reports and other documents that do not require formal or legal approval. However, this increase is offset by other factors, as described in the proposed fee rule (64 FR \_\_\_\_\_). To reiterate, as the NRC explained in the FY 1999 proposed and final fee rules (64 FR 15876, dated April 1, 1999; and 64 FR 31458, dated June 10, 1999), a \$4.1 million carryover from additional FY 1998 collections was applied to FY 1999 collections, thereby reducing the total fee recovery amount for FY 1999. However, this carryover does not exist for FY 2000. The \$1.7 million decrease in estimated total collections for FY 2000 is the difference between the \$4.1 million carryover from additional 1998 collections and the estimated \$2.4 million increase in Part 170 collections for FY 2000 as compared to FY 1999. In addition, the FY 2000 net annual fee billing adjustment, which is for invoices that will not be paid in FY 2000, the small entity subsidy, and payments received in FY 2000 for FY 1999 invoices, is approximately \$5.7 million, compared to the FY 1999 adjustment of \$3.2 million. As a result of these changes, which are summarized in Table II of this final rule, the total Part 171 billing amount increased from \$345.1 million in FY 1999 to \$346.7 million in FY 2000. In addition, there are approximately 530 few licensees available to pay the annual fees in FY 2000, primarily because Ohio became an Agreement State in August, 1999.

### 4. Impacts of the Revised Annual Fees on Licensees.

Comment. Several commentors stated that the NRC's FY 1999 rebaselining placed a significant financial burden on the uranium recovery industry due to increased fees, and that uranium recovery licensees bore a disproportionate share of the cost burden from this process. Many uranium recovery commentors asserted the uranium market is depressed and at a historical low, and that the NRC's current fee structure is excessive and unfair to the uranium recovery industry class of licensee. Furthermore, they indicated that licensees do not have the capability of passing through these additional costs to the consumer, thereby adversely affecting the viability of some companies. A reactor licensee who referred to the challenge of the competitive, unregulated market place for utilities,

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commented that the cost of regulating the industry is passed on to the consumer. This commenter indicated that businesses do not locate in the company's area, or end up leaving the area, because the electric rates there are among the highest in the State.

Response. The NRC acknowledges the commenters' concern about the depressed state of the uranium industry, and that any increase in fees to uranium recovery licensees poses a significant financial hardship. However, without legislative relief, the NRC is mandated by OBRA-90 to collect approximately 100 percent of its budget authority. As stated in response to similar comments on this issue in the FY 1993 fee rule (58 FR 38667; dated July 20, 1993), the Commission lacks the expertise or information needed to determine whether, in a market economy, particular licensees can or cannot recapture the costs of annual fees from their customers. The Commission is not a financial regulatory agency, and does not have the resources necessary to continuously evaluate purely business factors. The annual fees must have, to the maximum extent practicable, a reasonable relationship to the cost of providing regulatory services in order to meet the requirements of OBRA-90. Therefore, the Commission is not changing its previous decisions against basing fees on licensees' economic status or market conditions, and has only considered the fee impacts it is obligated by law to consider.

The Commission established its policy regarding rebaselining frequency in the FY 1999 final fee rule (64 FR 31448; dated June 10, 1999). Therein the Commission determined that future annual fees should be rebaselined every three years, or earlier if warranted. This decision was based on the experience gained as a result of applying the criteria from rebaselining over the previous four years. The Commission's decision on the appropriate method for establishing annual fees (e.g., rebaselining vs percentage change) is made each year after considering all relevant factors. Rebaselining years, as opposed to percentage change years, can result in wide fluctuations of costs for certain classes of licensees due to substantial changes in the NRC's total budget or the magnitude of the budget allocated to a specific class of licensee, decreasing numbers of licensees in a particular class, etc. However, rebaselining on a systematic basis ensures that costs are allocated equitably among the various classes of licensees.

#### 5. Effects of Decreasing Numbers of Licensees.

Comment. Several commenters broached the issue of annual fee increases that result from a decreasing number of licensees available to pay the fees. Some commenters questioned why NRC's budget did not decrease commensurate with the decrease in licensees. One commenter, representing commercial nuclear reactor licensees, stated that a decrease in the number of materials licensees was the only reason given for the 1.4 percent increase in power reactor licensee's annual fees, which in the commenter's view, suggests that the increase is solely attributable to the costs of regulating materials licensees and therefore these costs have no relation to nuclear power reactors. The uranium recovery industry expressed apprehension about the decreasing number of licensees in the uranium recovery industry, thereby creating the effect of the last licensee subsidizing the NRC's entire Uranium Recovery Branch.

Response. The NRC acknowledges the commenters' concern regarding the effects a declining licensee base has on the Part 171 fees assessed to the remaining licensees. Given the requirements of OBRA-90, the NRC has no option but to assess annual fees to NRC licensees to recover the budgeted costs not recovered through Part 170 fees and other receipts.

The NRC's fee-based budget for FY 2000 did in fact decrease by \$2.6 million from FY 1999, as shown in Table II of the proposed rule and this final rule. However, the need for generic efforts and other activities of the agency may not necessarily decrease at the same rate as the decrease in the number of licensees. For example, the agency's cost to establish a risk-informed, performance-based regulatory framework are not reduced by a decrease in the number of licensees. Similarly, the costs to maintain the Emergency Response Center are not affected by the number of licensees. The NRC continually evaluates options to reduce costs, including costs in those areas where the licensee base is diminishing, without sacrificing its health and safety mission.

In the years that annual fees have been based on the percent change method (FYs 1996, 1997, 1998, and 2000), there have been decreases in both materials licenses and reactor licenses. For example, in FY 1998, the equivalent of 2.3 fewer reactor licensees were available to pay the annual fees compared to FY 1997. This represented a reduction of approximately 20 percent of the total operating reactors. In FY 2000, there are approximately 530 fewer materials licensees compared to FY 1999, a reduction of approximately 10 percent.

Under the percent change method, which has been endorsed by most of those commenting on the methodology since it was introduced in FY 1995, the number of licensees is only one factor in the determination of the percentage change to the annual fees needed to assure 100 percent fee recovery. This does not mean that the percentage change to the previous year's annual fees is related to a change in the costs of regulating the class of licensees that experienced the decrease in licensees. Rather, as shown in Table II, the percentage change is based on the changes to the total fee recovery amount, the estimated collections from Part 170 fees and other receipts, and billing adjustments necessary to meet the 100 percent fee recovery requirement.

*is adjusted for the number of licensees,*

The NRC supports legislative relief with respect to the NRC activities that have no direct relation to the licensees who are assessed the costs as part of their annual fee (e.g., Agreement State program oversight, international programs, etc.). As noted, in the response in \_\_\_\_\_, the Senate has passed such legislation. Additionally, the NRC is seeking an amendment to the Atomic Energy Act to provide it the authority to impose fees on all other Federal agencies.

#### 6. Fee Stability.

Comment. Several commenters expressed concern over the instability of fees from year to year. *states that* As a result, it becomes increasingly difficult for licensees to accurately budget for NRC's annual costs.

Response. To address licensee concerns about fee stability and predictability, the Commission adopted the policy of adjusting the annual fees by the percentage change in the total NRC budget, with adjustments for numbers of licensees in particular fee classes and other necessary adjustments to meet the requirement of recovering approximately 100 percent of the budget through fees. This percentage change method is used only if there has not been a substantial change in the total NRC budget or the magnitude of the budget allocated to a specific class of licensees, in which case the annual fees will be rebaselined. As of FY 1999, the maximum interval for rebaselining is three years; however, the Commission has stated that it will rebaseline earlier if warranted. Based on the mixed support for both fee assessment methodologies, in FY 1999, the Commission adopted the policy of rebaselining every three years while using percentage change during the interim years.

7. Assessment of Annual Fees to Licensees in Standby or Decommissioning.

Comment. One commenter indicated it was inappropriate for the NRC to charge licensees in 'standby' mode the same annual fees as licensees who are actively operating a facility, especially in light of the fact that regulatory review and inspection efforts by the NRC are minimal for these dormant sites. Similarly, another commenter remarked that the NRC should lessen or discontinue its assessment of annual licensing fees on decommissioned facilities that are simply awaiting NRC approval of reclamation plans.

Response. In the FY 1991 fee rule the Commission made a determination to recover NRC costs attributable to uranium recovery licensees either in operation or standby. Therein the Commission stated that this method was practical, equitable, and a fair way to recover NRC costs given the limited number of operating mills, and is consistent with the approach taken for other classes of licensees. The Commission further elaborated on this issue in response to a similar comment from the American Mining Congress in 1995 (60 FR 20918, dated April 28, 1995). Here the Commission asserted it will continue to assess annual fees based on whether a licensee holds a valid license with the NRC that authorizes possession and use of radioactive material, regardless of whether the facility is actively operating or in a standby status. The basic premise for this policy is that the benefit the NRC provides a licensee is the authority to use licensed material. The choice of whether or not to exercise that authority is a business decision of the licensee.

Because of the mandate that the NRC recover approximately 100 percent of its budget through fees, to refrain from charging annual fees to licensees in a standby mode would increase the annual fees for other licensees in the class because the number of licensees assessed annual fees would decrease. Such an approach would raise fairness and equity concerns. However, licensees who voluntarily relinquish the authority to operate and have ceased operations will have their annual fee waived by the NRC, to include sites with reclamation or decommissioning plans pending NRC review. Thus, the commenter's remark about the NRC assessing annual fees to sites in decommissioning is incorrect, and therefore moot.

It should be noted that licensees in standby status receive benefit from NRC's generic guidance and rules applicable to their class of licensee. Additionally, any reduction in

required licensing reviews and inspections for licensees in a standby mode would be reflected in reduced Part 170 fees assessed to them.

872. Relationship Between Benefits and Fees

Comment. Several uranium recovery commenters espoused a lack of relationship between NRC's regulatory program and the benefits derived by industry, such as a disparity in Part 171 fees vs Part 170 fees and excessive levels of oversight/inspections for operating licensees for what amounts to a relatively benign industry from a health and safety standpoint.

Response. In the FY 1999 <sup>after</sup> rulemaking the NRC looked <sup>at</sup> ways to recover more of <sup>NRC's costs</sup> its fees through Part 170 <sup>fees</sup> related activities. Therein the Commission decided to expand the scope of Part 170 ~~fees~~ to include incident investigations, certain performance assessments and evaluations, reviews of reports and other submittals such as responses to Confirmatory Action Letters, and full cost recovery for time expended by PMs (except time spent on generic activities such as rulemaking, leave, etc.). Further discussion concerning Part 170 and 171 percentages and assessment is discussed in Section ~~of the rulemaking~~ <sup>of the rulemaking</sup>.

The NRC takes issue with the commenters' remark about the uranium recovery industry being subjected to excessive regulatory oversight by the NRC for a relatively low risk operation. The NRC is charged with the responsibility of regulating the nation's civilian radioactive source material supply in a manner that is safe to public health and the environment. As such, uranium mining is one of the activities that the NRC regulates under its mandate. The commenters' suggestion that uranium mining presents a relatively low health and safety risk does not obviate the NRC's responsibility to regulate the industry, nor does it address the potential health, safety, and environmental issues associated with groundwater clean-up, tailings impoundments, facility decommissioning, yellowcake processing and handling, etc. When developing its annual budget, the NRC's Uranium Recovery Branch looks at the level of regulatory effort needed to fulfill its mission and bases its inspections and review efforts accordingly. This budget is closely scrutinized by the NRC's Office for Nuclear Material Safety and Safeguards, the Commission, and the U.S. Congress before it's approved to ensure proper resources are allocated to sufficiently protect public health and safety, and the environment, at the most efficient staffing level.

Additionally, the NRC has examined ways to reduce or eliminate inspections associated with uranium recovery facilities. In establishing inspection frequencies, the NRC considers the risk to public health and safety, and the environment. Sites under reclamation are to be inspected once every three years unless a specific request is received from a licensee for the NRC staff to review elements of construction on an earlier basis. Generally, sites on standby status are to be inspected every two to three years. Facilities that are currently in operational status are to be inspected twice a year, with the option for a reduction to once a year made by the NRC based on the site's previous inspection record. Thus, if an operating uranium recovery licensee has a good inspection record and the NRC determines that a reduced number of inspections is warranted, it will eliminate one biannual inspection. Furthermore, the NRC has instituted performance-based licensing for uranium recovery licensees to help streamline licensing and oversight

activities, and when implemented properly by the licensee, should result in reduced review efforts by the staff.

The aforementioned programmatic efficiencies are intended to reduce the amount of resources expended on licensing and inspection activities. However, there are other activities that have required increased resources. For example, three uranium recovery licensees were involved in Atomic Safety Licensing Board administrative hearings over the last several years, which has consumed substantial staff resources. The resources affect the Part 171 fee base because, in response to previous proposed rules, commenters, including the uranium recovery industry, were overwhelmingly in favor of not assessing Part 170 fees for contested hearings.

**Comment.** Many commenters voiced their displeasure with the inequities of OBRA-90, and encouraged the NRC to continue its efforts in pursuing legislative action to obtain fee relief for the uranium recovery industry.

**Response.** The FY 1999 fee rule outlines the actions the NRC has taken to address the inequities of the annual fees. As noted in response to A.1 above, the NRC supports legislation that would reduce the NRC's fee recovery amount in order to address the fairness and equity concerns. The Senate has passed such legislation.

**D. X.** Other Issues.

1. NRC'S Budget.

**Comment.** One commenter, referring to the NRC's FY 2001-2005 Five Year Plan, indicated that NRC's overall budget does not reflect the agency's stated objectives to become more effective and efficient. The commenter believes that changes in NRC's regulatory approach, the industry's good performance, and decreases in licensing actions, generic communications, inspection requirements, and time spent on allegations, should lead to a reduction in FTE, not an increase as projected in the budget plan.

**Response.** The NRC's budgets, current or future, are not within the scope of this rulemaking. The purpose of this rulemaking is to establish the fees necessary to recover approximately 100 percent of the agency's FY 2000 budget authority as required by OBRA-90. The agency's budget requests undergo extensive internal examination before they are submitted to the ~~Office of Management and Budget (OMB)~~ <sup>Adm</sup>. After OMB review, the budget requests are submitted to Congress, where they undergo additional scrutiny. This review process assures that the budgets reflect the resources necessary for the NRC to carry out its health and safety mission.

2. NRC's Jurisdiction for In-Situ Leach

**Comment.** Uranium recovery commenters<sup>e</sup> urged the NRC to relinquish its jurisdiction of in-situ leach (ISL) uranium mining wellfield regulation as outlined in the National Mining Association's (NMA's) 1998 White Paper to the Commission.

NOTE: THIS APPENDIX WILL NOT APPEAR IN THE CODE OF FEDERAL REGULATIONS.

*FINAL*  
APPENDIX A TO THIS PROPOSED RULE --  
DRAFT REGULATORY FLEXIBILITY ANALYSIS FOR THE  
AMENDMENTS TO 10 CFR PART 170 (LICENSE FEES) AND  
10 CFR PART 171 (ANNUAL FEES)

I. Background.

The Regulatory Flexibility Act (RFA), as amended, (5 U.S.C. 601 et seq.) requires that agencies consider the impact of their rulemakings on small entities and, consistent with applicable statutes, consider alternatives to minimize these impacts on the businesses, organizations, and government jurisdictions to which they apply.

The NRC has established standards for determining which NRC licensees qualify as small entities (10 CFR 2.801). These size standards reflect the Small Business Administration's most common receipts-based size standards and include a size standard for business concerns that are manufacturing entities. The NRC uses the size standards to reduce the impact of annual fees on small entities by establishing a licensee's eligibility to qualify for a maximum small entity fee. The small entity fee categories in §171.16(c) of this ~~proposed~~ *final* rule are based on the NRC's size standards.

The Omnibus Budget Reconciliation Act (OBRA-90), as amended, requires that the NRC recover approximately 100 percent of its budget authority, less appropriations from the